No. 2630

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FIREMAN'S FUND INSURANCE COMPANY (a corporation),

Appellant,

vs.

GLOBE NAVIGATION COMPANY (a corporation) and S. P. WESTON, as trustee in bankruptcy of the GLOBE NAVIGATION COMPANY (a corporation), bankrupt,

Appellees.

BRIEF FOR APPELLANT.

EDWARD J. McCUTCHEN,
IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
BALLINGER, BATTLE, HULBERT & SHORTS,
Proctors for Appellant.

Filed this.....day of September, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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Statement of the Case.

The American schooner "Wm. Nottingham" sailed in October, 1911, from Westport, Oregon, for Callao, Peru. She carried a full cargo of lumber for delivery at the latter port, but she never reached her destination. On the contrary, she became waterlogged and was dismasted off the Columbia River on the very first leg of her voyage, and, after abandonment by her officers and crew, was rescued by a tug and towed to

Astoria and afterward to the port of St. Johns, Oregon, where such of her aforesaid cargo as had not been washed overboard at sea was discharged.

The charterer of the vessel for the ill-fated voyage was W. R. Grace & Co. Her owner was the Globe Navigation Company, appellee herein.

The charterer, before the vessel set sail, provided the captain, for and as the representative of the owner, with funds in the amount of eight thousand and thirty-two and twenty hundredths (8032.20) dollars as the equivalent of £1650 British sterling. Upon receipt of said sum, the captain gave W. R. Grace & Co. a certain instrument of indebtedness (in evidence as Libelant's Exhibit 3 and Plaintiff's Exhibit A), which was in words and figures as follows:

> "£1650—o/o Stg. Seattle, Sept. 27, 1911.
> At sight after the arrival of the American schooner 'Wm. Nottingham', under my command, at the port of Callao, or any other place at which her voyage may terminate, I PROMISE TO PAY to the order of W. R. Grace & Co. the sum of sixteen hundred fifty pounds (£1650-o/o) British Sterling or approved Banker's Demand Bills on London, for freight advance received at Seattle, Wash., as per receipt given, for the payment of which I hereby pledge my vessel and her freight; and I hereby assign to the legal holder of the obligation, all my lien and claim against freight, vessel and owners, with power to take in my name any and all steps necessary to enforce the same; and my consignees at port of discharge are hereby instructed to pay this obligation, and deduct the amount thereof from the freight due said vessel. In case of non-payment, the holder shall also be entitled to the benefit of all liens in law, equity or

admiralty which the master or owner of the vessel may be entitled to against any part of the cargo or its owners for freight, or any other charges whatsoever.

This claim is to have priority of payment over all others that may be presented against the said freight and vessel.

My vessel is now lying at the port of Astoria, Oreg., loaded with cargo Oregon pine and ready to sail for Callao, Peru.

Signed in triplicate, one being accomplished, the others to stand void.

A. M. Swenson,
Master Am. Schr. 'Wm. Nottingham.' "

W. R. Grace & Co. took out insurance on this payment with the Fireman's Fund Insurance Company, appellant herein (the certificate of insurance being in evidence as Libelant's Exhibit 1), and the latter paid the insurance after the abandonment of the contemplated voyage and the return of the vessel to the port of St. Johns, taking from W. R. Grace & Co. an express subrogation of its rights in the premises against the Globe Navigation Company (Libelant's Exhibit 5) and an assignment of the aforementioned draft duly endorsed (Libelant's Exhibit 3).

The receipt of the so-called advance was acknowledged in writing both by the captain of the vessel (Plaintiff's Exhibit B) and by her owner, the Globe Navigation Company (Libelant's Exhibit 4 and Plaintiff's Exhibit D).

There may be ground for query whether the foregoing sum was paid as an advance against freight evidenced by the sight draft, or as prepaid freight

simply. But it is a fact undisputed that the Globe Navigation Company retained and still retains that money; and it is a further fact equally undisputed that the Globe Navigation Company never earned that money, so retained, by delivery of the lumber cargo of the "Wm. Nottingham" at Callao in accordance with the terms of the charter party.

Our position is plain and is simply this: The Globe Navigation Company is holding money which it has not earned and which, under the settled American law, it is not entitled to retain. To that money this appellant, in our view, is indisputably entitled, whether it be regarded as an advance against freight evidenced by the draft, or as prepaid freight. But, if the court hold, as did the court below (tr. p. 70) that we are not entitled to said money by virtue of the draft and our ownership thereof, and upon the ground of contract, we are certainly and unquestionably entitled thereto as successor by subrogation to the right of W. R. Grace & Co., to a return of prepaid freight unearned; and if the original libel was not framed upon that theory, the court is nevertheless obligated under the admiralty rules applicable in the premises, to give us, under our prayer for general relief, the decree for which we pray.

Specifications of Error.

Errors have accordingly been assigned, in the Apostles on appeal, to the decree of the District Court, as follows:

1. That the District Court erred in entering the decree herein of date the 21st day of April, 1915, dismissing the libel herein.

2. That the District Court erred in entering the decree herein of date the 21st day of April, 1915, adjudging that respondent (appellee) recover its costs in the sum of twenty-nine and 50/100 (29.50) dollars.

3. That the District Court erred in not holding and deciding that libelant (appellant) was entitled on the libel and under the evidence adduced to a decree in the sum of eight thousand thirty-two and 20/100 (8032.20) dollars, with interest and costs as prayed for in the libel herein.

4. That the District Court erred in not holding and deciding that libelant (appellant) was entitled on the evidence adduced and under the prayer for general relief made in said libel to a decree in the sum of eight thousand thirty-two and 20/100 (8032.20) dollars, with interest and costs.

5. That the District Court erred in not holding and deciding that libelant (appellant) was entitled on the substantive facts alleged and under the general relief prayed for in the libel and on the evidence adduced to a decree in the sum of eight thousand thirty-two and 20/100 (8032.20) dollars.

6. That the District Court erred in holding and deciding that there was a variance between the allegations of the libel and the proof adduced, and for that

reason denying unto libelant (appellant) the relief prayed for in said libel.

7. That the District Court erred in holding and deciding that the authority of the master to pledge the vessel was limited to necessaries.

8. That the District Court erred in deciding that the execution of the draft issued was not made for necessaries.

9. That the District Court erred in holding and deciding that libelant (appellant) must be held to the basis of respondent's (appellee's) knowledge of the draft.

10. That the District Court erred in holding and deciding that the right to recovery for advanced freight inured to libelant (appellant) under the charter-party stipulations and law applicable thereto, and not upon the draft executed by the master.

11. That the District Court erred in holding and deciding that the action is grounded upon the draft and not upon the advanced freight paid, and in not entering a decree in libelant's (appellant's) favor under the prayer for general relief in the libel on the evidence adduced.

12. That the District Court erred in holding and deciding that the draft was issued without authority.

13. That the District Court erred in holding and deciding that the draft could not support an action for recovery.

Brief of the Argument.

I. Viewing the payment to the captain as an advance against freight evidenced by the captain's draft, appellant is entitled to recover upon the draft (which is due and payable) as the legal owner and holder thereof by due endorsement and assignment.

II. Viewing the payment to the captain as prepayment of freight, appellant is entitled to a recovery thereof by virtue of subrogation to the rights of W. R. Grace & Co., the charterer. The right of the charterer to a return of prepaid but unearned freight money is established in American law.

III. If appellant, following the theory that the payment to the captain was an advance *against* rather than *prepaid* freight, mistakenly sued upon the draft, instead of predicating its libel upon its rights by subrogation to a return of the prepaid but unearned freight money, the Court should, none the less, award appellant, under the general prayer for relief, the decree which it asks; for it is the settled rule of admiralty practice and pleading that there is no technical rule of variance in admiralty and that it is the duty of the court to extract the real case from the whole record and decide accordingly. The court below therefore erred in deciding against appellant because its action was "grounded upon the draft and not upon 'advance of freight.' "

I.

VIEWING THE PAYMENT TO THE CAPTAIN AS AN ADVANCE AGAINST FREIGHT EVIDENCED BY THE CAPTAIN'S DRAFT, APPELLANT IS ENTITLED TO RECOVER UPON THE DRAFT (WHICH IS DUE AND PAYABLE) AS THE LEGAL OWNER AND HOLDER THEREOF BY DUE ENDORSEMENT AND ASSIGNMENT.

This draft was duly executed by Captain Swenson of the "Wm. Nottingham" before he set sail from Westport, Oregon, and at that time he received the amount of money represented by the draft and gave a receipt therefor (tr. p. 55). The draft by its terms is now, and has been, ever since the vessel returned to and discharged her cargo at the Port of St. Johns, due and payable, the draft providing, "At sight after the arrival of the American Schooner 'Wm. Nottingham', under my command, at the Port of Callao, *or any other place at which her voyage may terminate,* I PROMISE TO PAY," etc. (italics ours). The voyage in question terminated, as the facts recited in the Statement of the Case (supra) show, and as the court below found, at the Port of St. Johns, Oregon. In the opinion of Mr. E. T. Ford, the Sub-manager of W. R. Grace & Co., the latter company could have negotiated the draft (tr. p. 32). When the Fireman's Fund Insurance Company paid W. R. Grace & Co. the insurance on this draft, it was surrendered to the insurer, duly endorsed by W. R. Grace & Co. The respondent (appellee) by its answer admits that the insurance company has demanded of it the payment of the aforementioned sum of eight thousand thirty-

two and 20/100 (8032.20) dollars, and that it has refused to pay the same.

The court below upholds this refusal upon the ground that the master had no authority to execute the draft and to bind the owners of the ship thereby. To this, we say that while the record discloses no *express* authority to the master to execute the draft, it appears repeatedly (see e. g., tr. pp. 33, 34, 59 and 60) that these drafts were customarily in use as between W. R. Grace & Co., as charterer, and the Globe Navigation Company, as owner of ships. Mr. Ford, for instance, testified that to his personal knowledge this was the type of draft that W. R. Grace & Co. normally used in their transactions with the Globe Navigation Company and that his company never made advances without taking such drafts (tr. pp. 33, 34). Mr. Thorndyke, the manager of the Globe Navigation Company, indeed admits that the draft (Plaintiff's Exhibit E), issued in connection with a similar advance on the steamer "J. W. Clise" under charter from his company to W. R. Grace & Co., was executed in the same manner as the "Wm. Nottingham" draft (tr. p. 45). It seems most singular that this "Clise" draft should not have been seen by or known to Mr. Thorndyke until after the disaster to the "Wm. Nottingham", when a copy thereof, produced from the office files of the Globe Navigation Company itself in response to the call of the proctor for libellant (tr. p. 60), was exhibited to him during his deposition (tr. p. 61). It seems more singular, even, in the face of the testimony of Mr. Ford (corroborated by that of Captain Swenson) that

these drafts were regularly used in connection with advances by W. R. Grace & Co. to the Globe Navigation Company, that Mr. Thorndyke should never have seen any of them. Yet such is his testimony (tr. p. 47). We frankly confess that it never occurred to us for a moment at the time of the framing of this libel that the Globe Navigation Company would thus disavow all knowledge of these drafts.

Save for this contention, that the draft was executed by the captain without authority in that behalf, the appellee has no defense to the action on the draft, the allegations of its answer, to the effect that the insurance was obtained for the owner of the ship, and that the draft was executed without consideration, being, as the court below very rightly pointed out (tr. p. 69), unsupported by any evidence.

We venture to submit that the testimony that these drafts were in common use in connection with advances from W. R. Grace & Co. to the Globe Navigation Company, establishes that the master had, under the custom and usage thus prevailing, at least implied authority to execute this particular draft. If, however, the appellees insist on disavowing responsibility for the same and in regarding the payment to the master as a prepayment of freight, they have yet to show, and we contend that they cannot, under American law, show, that we are not entitled to recover back such prepaid freight, when it appears, as it here appears, that the same was not earned. This leads naturally to the next point in the argument.

II.

VIEWING THE PAYMENT TO THE CAPTAIN AS PRE-PAYMENT OF FREIGHT, APPELLANT IS ENTITLED TO A RECOVERY THEREOF BY VIRTUE OF SUBROGATION TO THE RIGHTS OF W. R. GRACE & CO., THE CHARTERER. THE RIGHT OF THE CHARTERER TO A RETURN OF PREPAID BUT UNEARNED FREIGHT MONEY IS ESTABLISHED IN AMERICAN LAW.

The Fireman's Fund Insurance Company paid to W. R. Grace & Co., after the abandonment of the voyage, the amount of the advance, taking from the assured a subrogation in the usual form to any and all rights which it might have against third parties in the premises (tr. p. 21 and Libelant's Exhibit 5). It needs no citation of authority, of course, to uphold the statement that even apart from such express subrogation the insurer is, in virtue of the established equitable doctrine, subrogated upon payment of and to the amount of the insurance, to any and all rights which the insured may have against third party wrongdoers. And, of course, whatever may have been or is the common-law procedure, suit for recovery in these circumstances may, in a court of admiralty, be asserted by the insurance company in its own name alone, where it has paid the insured the full value of the loss.

Cooley, Briefs on the Law of Insurance, Vol 4, p. 3930, and cases cited;

The Potomac v. Cannon, 105 U. S. 630;

Norwich Union Fire Ins. Society v. Standard Oil Company, 59 Fed. 984;

Sheldon on Subrogation, Sec. 221.

The respondent (appellee) in its reply brief in the court below, submitted an elaborate array of *English* authorities to show (using the words of the brief), that, "from Lord Tenterden's time to the present the rights of the ship-owner by English law to retain advance freight, notwithstanding the loss of the goods before the freight is earned, seems never to have been seriously doubted". That, of course, we grant. But these proceedings are before an American court, and the American cases hold emphatically and precisely the reverse of the English ruling. The American doctrine is that freight money prepaid but not actually earned is to be returned to the charterer. This doctrine will be found laid down in the following among numerous cases:

Burn Line v. United States & A. S. S. Co., 162 Fed. 298;

De Sola v. Pomares, 119 Fed. 373;

The Kimball, 3 Wall. 37, 45, 46; 18 L. ed. 50;

Chase v. Alliance Ins. Co., 91 Mass. (9 Allen) 311.

The court below, then, very rightly held on this point as follows:

> "The English law that the ship-owner may retain advance freight notwithstanding the loss of the goods before the freight is earned, does not obtain in the United States. Freight being compensation for the transportation of goods, is due only when goods are carried to destination, and any advance of payment may be recovered back on default of delivery, in the absence of an agreement to the contrary. Burn Line Lt. v. U. S. & A. S. S. Co., 162 Fed. 298",

It might naturally have been expected that the District Court, taking the view just expressed, and seeing that the facts shown by the record as a whole and very largely disclosed by respondent's very answer bring this case within the rule thus enunciated, would have decreed for the libelant, despite the fact that the action was originally instituted upon the draft; for the District Court was sitting as a court of admiralty, and such a court pays no regard to technical variance, provided only the record as a whole disclose a substantial case for the libelant The court, however, declined to decree in our favor upon the ground that the libelant had mistakenly grounded its action upon the draft, which the court held the master was without authority to execute. In so declining, said court, we respectfully submit, committed error. This contention is the subject of our next division.

III.

IF APPELLANT, FOLLOWING THE THEORY THAT THE PAYMENT TO THE CAPTAIN WAS AN ADVANCE AGAINST RATHER THAN PREPAID FREIGHT, MISTAKENLY SUED UPON THE DRAFT, INSTEAD OF PREDICATING ITS LIBEL UPON ITS RIGHTS UNDER THE SUBROGATION TO A RETURN OF THE PREPAID BUT UNEARNED FREIGHT MONEY, THE COURT SHOULD, NONE THE LESS, AWARD APPELLANT, UNDER THE GENERAL PRAYER FOR RELIEF, THE DECREE WHICH IT ASKS: FOR IT IS THE SETTLED RULE OF ADMIRALTY PRACTICE AND PLEADING THAT THERE IS NO TECHNICAL RULE OF VARIANCE IN ADMIRALTY AND THAT IT IS THE DUTY OF THE COURT TO EXTRACT THE REAL CASE FROM THE WHOLE RECORD AND DECIDE ACCORDINGLY. THE COURT BELOW THEREFORE ERRED IN DECIDING AGAINST APPELLANT BECAUSE ITS ACTION WAS "GROUNDED UPON THE DRAFT AND NOT UPON 'ADVANCE OF FREIGHT.'"

The court below, as heretofore stated, held that,

while the libelant would have been entitled to recover in an action grounded upon the doctrine of freight prepaid but unearned, it failed in the actual proceedings brought because they were predicated upon the captain's draft. In these circumstances, we contend that the court below committed error in not observing the settled rule of admiralty practice and procedure requiring that the judge shall, unless the defects in the libel shall have occasioned surprise to the adverse party, extract the real case from the whole record, and, under the general prayer, decree for the libelant if he be entitled to relief in consideration of all the facts.

This duty of admiralty courts to do justice under the general prayer, regardless of the precise trend of the pleading, is well stated in

Sonsmith v. Donaldson, 21 Fed. 671 at 673:

> "The libels in the present cases do not pray specifically for an adjustment of a general average loss. On the contrary, they pray for a decree against the propeller for the full amount of the loss, on the ground that it resulted from the breach of duty on the part of the propeller in not properly performing the contract of towage. *But, under the prayer for general relief, it is competent for the court to pass such decree as may be required by the proof in the record, although not fully and precisely stated in the libel.*"

This attention to the prayer for general relief was, as a matter of fact, very early and very emphatically enjoined upon admiralty courts by the Supreme Court of the United States in the case of

Penhallow et al. v. Doane's Administrators,
3 Dall. 54, 1 L. Ed. 507,

the court saying:

> "*It is alleged damages were not prayed for by the libel. It is a sufficient answer, that there is a prayer for general relief.* And so little do I think of this objection, and so much of the duty of a court, unaided by formal applications, where there is a substantial one, that I am strongly induced to think, if a case proper for a specific relief was laid before a civil law court, and the direct contrary to the proper relief was prayed for, yet the court even in this case would be justified in granting the relief that might be properly afforded, if the party who had committed the mistake consented to it; without that indeed it might be improper, for no court ought to force a benefit on a party unwilling to receive it."

See, also,

Pratt v. Thomas, 19 F. C. No. 11377.

The admiralty rules in this general connection were elaborately reviewed very recently by the Circuit Court of Appeals for the Fourth Circuit in the case of

The Prudence (1913), 204 Fed. 66,

wherein the court said (pp. 68-69) referring particularly to collision cases but in language broad enough to cover the situation generally:

> "Even where there are only two parties to a collision controversy, there is no rigid rule that a libelant, alleging one fault on the part of a defendant vessel, cannot recover on proof of a different fault. In The Cambridge, 4 Fed. Cas. 1118, the libel alleged only that the defendant's steamer ported when she should have starboarded. The evidence for the steamer proved that she was running at too great a speed in a fog and had no lookout forward. Judge Lowell held that the libelant could rely on these faults as well as on those alleged in the libel. He said:

'In our courts the question is treated as a matter of evidence rather than of pleading. If surprise is shown, there may be reason for excluding the testimony, or for giving time to meet it. If the witnesses of one side vary the case from that which his pleadings set up, it may be reason for disbelieving them. But it is the practice of our courts of admiralty rather to extract the truth and found a decree upon it, whenever, by amendment or otherwise, justice can be fully done to both parties, than to follow any very strict rules of variance.'

Justice Curtis in The Clement, 5 Fed. Cas. 1015, said:

'In all collision cases the court will look at the allegations of both the parties of all matters of fact, upon which fault or its absence depends; they will consider which of those allegations is proved, not allowing either party to contradict by proof what he has alleged; and, having thus extracted the real case from the whole record, will pronounce for the one party or the other as that case requires.'

In the case at bar there are four parties to the controversy and not two. Such a contest differs in kind, as well as in degree, from that in which there are but two antagonists. The rules which govern it must differ accordingly, whether it be waged in a court of admiralty or on the pages of Captain Marryatt. The question whether the Prudence and the Dempsey were on the west or on the east side of the channel was raised by the pleadings of the Norfolk and Barge 14. To this, among other issues, all parties directed their testimony. The rule which forbids a litigant to prove something which he has not charged is largely intended to prevent a surprise to his adversary. The Steamer Syracuse, 12 Wall. 167, 20 L. ed. 382.

> In this case there was no surprise and no possibility of it. Apparently every one who could throw any light upon the collision or its causes testified. In the admiralty there are no technical rules of variance or departure. The court below, having the whole matter before it, was bound to decree in accordance with the facts established. Dupon v. Vance, 19 How. 172, 15 L. Ed. 584; The Quickstep, 9 Wall. 670, 19 L. Ed. 767."

The case of

The Syracuse, 12 Wall. 167; 20 L. ed. 382,

referred to in the foregoing excerpt, is perhaps the leading case on the subject. The Supreme Court of the United States said therein (p. 384):

> "It is objected that the libel does not specifically charge this antecedent negligence as a fault. This is true, and the libel is defective on that account, but in admiralty an omission to state some facts which prove to be material but which cannot have occasioned any surprise to the opposite party, will not be allowed to work any injury to the libelant, if the court can see there was no design on his part in omitting to state them. *The Quickstep,* 9 Wall. 670 (76 U. S. XIX, 768); *The Clement,* 2 Curt. 363. There is no doctrine of mere technical variance in the admiralty, and subject to the rule above stated, it is the duty of the court to extract the real case from the whole record, and decide accordingly. It is very clear that the libelant had no design in view in omitting to state the failure to stop as a fault, and equally clear, that the proof on that subject, coming, as it did, from the opposite party, could not have operated to surprise them."

See, also,

The Stephen Morgan, 94 U. S. 599; 24 L. ed. 266;
The Volunteer, 149 Fed. 723.

In the case of *The Syracuse* (supra) the court lays special stress on the fact that the proof which was helpful to the libelant came "from the opposite party" (see the latter part of the quotation above) and in the case of *The Clement,* 5 Fed. Cas. 1015, referred to above in the excerpt from *The Prudence,* Justice Curtis states that "the court will look at the allegations of both the parties". Be it noted, therefore, in respect to the case at bar, first, that the allegation that the money paid Captain Swenson was prepaid freight, is made by respondent (appellee) in Paragraph VIII of its answer (tr. 12) as follows:

> "* * * that at Seattle, Washington, on June 3, 1911, the respondent entered into a written charter-party with W. R. Grace & Co., to transport a cargo of lumber from the Columbia River to Callao, Peru, for a consideration therein agreed upon, and as a part of the consideration therefor it was agreed *that one-third of the freight would be advanced and paid by charterers on account of the freight under said charter-party* subject to a charge of seven per cent. to cover interest, insurance and commission * * *" (italics ours),

and, in the second place, that the proof in support of said allegation was likewise provided by respondent or appellee (see p. 23 of the transcript).

We respectfully ask that the decree entered in the court below be reversed, and that said court be directed to enter a decree for libelant (appellant here) in accordance with the prayer of the libel, and that

appellant be accorded its costs and such other and further relief as may be appropriate in the premises.

Dated, San Francisco,
September 18, 1915.

Respectfully submitted,

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McCutchen, Olney & Willard,
Ballinger, Battle, Hulbert & Shorts,
Proctors for Appellant.